HOBOKEN LAND BUILDING, L.P., and HOBOKEN HOLDINGS, L.P.,

Plaintiff,

v.

CITY OF HOBOKEN, CITY COUNCIL OF THE CITY OF HOBOKEN, RAVI S. BHALLA, in his capacity as the Mayor of the City of Hoboken, and KMS DEVELOPMENT PARTNERS, L.P.,

Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO. HUD-L-4580-18

Civil Action

OPINION/ORDER
Denying Defendants' Motion to Dismiss Certain Counts of the Complaint

Decided: March 26, 2019

Paul H. Schneider, attorney for Plaintiffs
Thomas A. Abbate, attorney for Defendants City of Hoboken and Ravi Bhalla
Antonio J. Casas, attorney for Defendant KMS Development Partners, L.P.
ANTHONY V. D'ELIA, J.S.C.

In this Prerogative Writ matter, Plaintiffs, owners of property adjoining an area which was designated in need of rehabilitation by the City of Hoboken challenge, and seek to vacate, the Hoboken Resolution approving the Redevelopment Area as being ultra vires under New Jersey's Local Redevelopment and Housing Law ("LRHL") and also challenge the approved Redevelopment Agreement as being arbitrary, capricious, unreasonable and contrary to public policy regarding land use planning.

The Defendants now move to dismiss, pursuant to R. 4:6-2(e), Plaintiff's claims asserted in the first, second, third, fifth and sixth counts of the Complaint for failure to state claims upon which relief can be granted. Defendants assert that, despite granting the Plaintiff every reasonable inferences of fact in connection with this application, the factual allegations of the Complaint are palpably insufficient to support any claims upon which relief can be granted. For the following

reasons, the Court will deny Defendant's motion to dismiss the relevant counts of Plaintiff's Complaint.

Pursuant to the LRHL, N.J.S.A. 40A:12A-1 et. seq., the Defendant City of Hoboken designated certain properties within the City as "areas in need of rehabilitation" ("Hoboken Post Office Rehabilitation Area"). Thereafter, on April 19, 2017, the City Council adopted an ordinance regarding the Hoboken Post Office Redevelopment Plan ("Redevelopment Plan") for land within the Hoboken Post Office Rehabilitation Area. By resolution dated April 4, 2018, the Council conditionally designated Defendant KMS Development Partners, L.P. ("KMS") as the redeveloper of the subject property. The Redevelopment Plan was then amended and as part of the negotiations, KMS agreed to pay certain "givebacks" or financial payments, otherwise known as community benefit payments, to the City ($2,000,000), along with $1,000,000 to a private, non-profit organization, the Hoboken Public Education Foundation and an additional $485,000 to certain charter schools in the City. On November 7, 2018, the City Council adopted a second reading of the Ordinance adopting the amended redevelopment plan, which included the above givebacks.

Count One of the Complaint alleges that the City Council had no specific statutory authority to condition the redevelopment plan or amendments to that plan on the givebacks as they violated clear New Jersey public policy and that the City did not have the statutory authority to negotiate for same. Count Two challenges the Redevelopment Agreement as being arbitrary, capricious, unreasonable and contrary to public policy, for basically the same reasons. Count Three of the Complaint challenges the specific $1,000,000 payment to the Hoboken Public Education Foundation as ultra-vires and on the additional ground that the payment promotes favoritism, a lack of accountability and would not promote diversity, as it appears that no members of the Foundation

are minorities. Count Five and Six challenge the City's adoption of the Ordinance amending the Redevelopment Plan on grounds that parallel Counts One and Two, respectively.

For purposes of this motion, the City stipulates that the Redevelopment Area and Redevelopment Plan itself did not create a need for payment of the givebacks and that none of the givebacks are related to property located within the Redevelopment Area.

Under R. 4:6-2 (e) this Court is to determine whether a cause of action is suggested by the facts in this case. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 747 (1989), citing, Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). The inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the Complaint. Printing Mart, supra, at 746. The Plaintiff is entitled to every reasonable inference of fact. Ibid. If the Complaint states no basis for relief and discovery will not provide one, dismissal is the appropriate remedy. Banco Popular, N.Am. v. Gandi 184 N.J. 161, 166 (2005).

To defeat a motion to dismiss under the applicable Rule, Plaintiff's burden is not to prove the case, but only to make allegations, which, if proven, would constitute a valid cause of action. Leon v. Lite A Corp., 340 N.J. Super 462, 472 (App. Div. 2001). The Court is not to pass judgment on the truth of the facts alleged, but, rather, accept them as facts" … for the purpose of reviewing the motion to dismiss". Banco Popular, supra at pg. 166.

Here, no party has moved for summary judgment. Indeed, there does not seem to be a significant factual dispute between the parties relating to the discrete question of whether the City has the legal authority to adopt an ordinance approving the Amended Redevelopment Plan to include the givebacks. Certainly, there may be factual disputes as to whether the City's decision was arbitrary, capricious or unreasonable, but those factual disputes perhaps need not be addressed

if the Court now decides that the City did not have the legal authority to condition the Redevelopment Plan on the givebacks.

The parties argued whether the LRHL supersedes the Municipal Land Use Law ("MLUL"). In point of fact, Defendant does not posit that the LRHL supersedes the MLUL but, rather, that the statutory conditions for givebacks and related case law under the MLUL (requiring such givebacks to relate to or be caused by Planning or Zoning Boards approval under the MLUL) are inapplicable. Defendant argues that since the statutory/conditions imposed on similar givebacks under the MLUL are not present in the LRHL, than the City has liberal discretion to require these types of givebacks; so long as the givebacks serve a "valid public purpose". Defendant concedes that the conditions/limitations on such givebacks, as expressly contained in the MLUL, are not similarly referenced in the LRHL.

Plaintiff contends that there is no statutory authorization for the City to demand such givebacks and also argues that to permit such givebacks would create an unacceptable possibility for abuse and fraud in negotiations between an applicant for Redevelopment designation, or one seeking to obtain a Redevelopment Agreement from the City, and the City itself.

This Court must, of course, first determine whether the City has the authority to approve or condition the designation of a redevelopment area or designation of redeveloper, in whole or in part, upon payment of such givebacks. If the City does not have that authority, or if it would be against public policy to permit municipalities to require such givebacks, then there is no need to address the question of whether givebacks to specific non-profit organizations or specific portions of a public school system (as here) would be valid.

NO STATUTORY AUTHORITY FOR GIVEBACKS

For the following reasons, the Court concludes that Hoboken does not have the statutory authority to condition or require these givebacks under the LRHL and, further, that permitting a municipality to require givebacks, or condition approvals for an ordinance approving a redevelopment area or redeveloper on such givebacks, would create unacceptable possibilities for abuse and fraud and cannot be permitted for reasons of public policy. Therefore, the Court need not address the validity of specific payments to the non-profit Education Foundation or the charter school. [1]

A Municipality does not have inherent authority to regulate the use of land. Riggs v. Twp. of Long Beach, 109 N.J. 601, 610 (1988). Rather, the authority to regulate land use is vested in the legislative branch of the Government by Article III of the New Jersey Constitution. Ibid. In turn, the Constitution authorizes the Legislature to delegate some of its powers to subordinate levels of Government. As the Supreme Court stated in Riggs, at pg. 610:

> Municipalities do not possess the inherit power to zone, and they possess that Power, which is an exercise of Police power, only insofar as it is delegated to them by the legislature.

The land use power of a municipality is restricted by the power given to it by the Legislature, and there must be statutory authorization for a municipality's exercise of its land use power in order for the municipality's action to be valid. Riggs, supra, at 610; See Lusardi v. Curtis Pt. Property Owners Ass'n, 86 N.J. 217, 226 (1981).

[1] In any event, the Court would have concluded that the Mayor and Council's selections of one non-profit entity over another, or the charter school over the general Board of Education budget as beneficiaries of the givebacks, would clearly have been ultra-vires as the risk for a Mayor and Council favoring one non-profit organization over another, or one area of the public school system over another, would be enormous.

The Legislature has delegated and defined the authority to regulate land use by enacting, amongst other statutes, the MLUL. Rumson Estate v. Fairhaven 177 N.J. 338, 349 (2003). A separate legislative grant of authority to municipalities to regulate land use is that found in the LRHL. The LRHL does not supersede the MLUL. See E.G. Britwood Urban Renewal LLC v. Asbury Park 376 N.J. Super 552, 557-68 (App. Div. 2005).

The LRHL establishes a process whereby the Municipality may designate an area to be in need of redevelopment or in need of rehabilitation. N.J.S.A. 40A: 12A-3, -5, -6 and -14. Upon designating an area as in need of rehabilitation or redevelopment, the municipality may adopt a redevelopment plan to guide the redevelopment or rehabilitation of the designated area. N.J.S.A. 40A:12A-7. The Act defines a redevelopment plan as follows:

> "Redevelopment Plan" means a plan adopted by the governing body of a Municipality for the redevelopment or rehabilitation of all or any part of the redevelopment area, or an area in need of rehabilitation; which plan shall be sufficiently complete to indicate its relationship to definite municipal objectives as to appropriate land uses, public transportation, recreational and municipal facilities, and other public improvements; and to indicate the projected land uses and building requirement in the redevelopment area or area in need of rehabilitation, or both. N.J.S.A. 40A:12A-3.

After making such a designation or designations, a municipality may adopt, by ordinance, a redevelopment plan as specified and determine whether the redevelopment plan supersedes the applicable provisions in municipal zoning ordinances for the designated area, or is an overlaid zoning district within the area. N.J.S.A. 40A:12A-7. Under the LRHL, a redevelopment plan must also state its relationship to local objectives as to appropriate land uses, population density, improved traffic and public transportation, public utilities, recreational facilities and other public improvements. N.J.S.A. 40A:12A-7a (1).

Significantly, none of the detailed provisions of the LRHL authorize a municipality to contract to receive payments or contributions from a Redeveloper for any expenses or public improvements

that have no relationship to the area in need of rehabilitation or the project of redevelopment in that Area.

By way of contrast, and pursuant to the MLUL, there are specific conditions and limitations placed upon a municipality for it to require off-tract costs and expenses to be paid by a developer as conditions for approval of a sub-division or site plan. More specifically, N.J.S.A. 40:55D-42 provides as follows:

> The governing body may, by ordinance, adopt regulations requiring a developer, as a condition for approval of the sub-division or site plan, to pay the pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefore, located off-tract, but necessitated or required by construction or improvements within such sub-division or development. Such regulations … shall establish fair and reasonable standards to determine the proportionate pro-rata amount of the cost of such facilities that shall be borne by each developer or owner within a related and common area. N.J.S.A. 40:55D-42.

As noted above, the MLUL specifically contemplates local public entities conditioning governmental approvals upon payments relating to off-tract expenses under certain conditions. The LRHL has no similar language. Nevertheless, it is clear that the Legislature was aware of the various provisions of the MLUL when it drafted and adopted the LRHL. The LRHL does not supersede the MLUL as no provision of the LRHL specifies that it supersedes the MLUL, except for the provision regarding the notice required for the adoption of a redevelopment plan. The LRHL also coordinated with the MLUL by requiring the Municipal Planning board to review development and redevelopment applications in accordance with the requirements set forth by ordinance pursuant to the MLUL. Jersey Urban Renewal LLC v. City of Asbury Park, 377 N.J. Super 232 (App. Div. 2005). Thus, the legislature was specifically cognizant of and, in fact, considered the relationship between the LRHL and the MLUL when it adopted the LRHL in 1992; seventeen years after the MLUL was adopted.

The significance of the LRHL not containing similar language regarding off-tract contributions cannot be understated. The general rule is that what "The Legislature omits, courts will not supply". Kennan v. Essex Cty. Freeholders, 101 N.J. Super 495, 507 (Law Div. 1968), aff'd. 106 N.J. Super 312 (App. Div. 1969). There are certain situations when a court may supply apparent omissions in a statute, such as when words have been omitted from the statute by inadvertence or by clerical error, and the intent of Legislature is clearly ascertainable from the context. No such situation exists here, however, and insertions of words into a statute "is exercised with unusual caution". See Property Owner's Assn. of N. Bergen v. N.Bergen Tp. 74 N.J. 327, 338 (1977).

There is nothing inherit in the LRHL which could be read to impute to a municipality the power to require or demand such off-tract contributions to further the purposes of the LRHL. Obviously, the purpose of the LRHL is to address issues within the redevelopment area or need of redevelopment or related to the redevelopment area and plan. Off-tract contributions that have no relationship whatsoever to the redevelopment area or redevelopment plan, except for the fact that the municipality may require same, do not further the purposes of the LRHL.

Moreover, it can be inferred that since the Legislature did not include any type of language similar to that which is contained in the MLUL regarding off-tract contributions, than the Court should not "read" that language into the LRHL. When the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded. Higgins v. Pascack Valley Hosp. 158 N.J. 404, 419 (1999). The Legislature is presumed to be thoroughly conversant with its own legislation. State v. Gilicia 210 N.J. 364, 381 (2012). Obviously, as noted above, the Legislature understood and considered the relationship between the MLUL and LRHL and omitted similar MLUL language regarding off-tract contributions in the LRHL. Thus, this Court will not imply such language where it was not included by the Legislature in the LRHL.

There being no statutory authorization under the LRHL for the givebacks in question, the Defendant City could not have lawfully exacted the off-tract contributions involved herein. Any agreements which purport to be "voluntary" by a developer for such contributions (so as to obtain the approval of a redevelopment plan or its own designation as a "redeveloper") are, by definition "involuntary" contributions and cannot be permitted for the reasons expressed above.

Thus, the Legislature specifically provided in the MLUL that the governing body may require contributions for off-tract expenses or other items related to or caused by the sub-division or site plan to be approved. Those contributions are limited to specific categories of infrastructure improvements and must be "necessitated or required by construction or improvements within such sub-division or development". Case law makes clear that there must be, at a minimum, some type of causal relationship between the development to be approved and the activity funded by the contributions. N.J. Builders Ass'n v. Bernard Twp., 108 N.J. 223, 227 (1987).

REQUIRING SUCH GIVEBACKS VIOLATES PUBLIC POLICY

As a general public policy, the Appellate Division has emphasized that any such contributions or givebacks must be based on the goals of sound land use regulations and not "freewheeling bidding" that indicates that approvals are "up for sale". See Nunziato v. Edgewater Planning Board, 225 N.J. Super 124, 134 (App. Div. 1998). While it is true that the Nunziato case arose in the context of a zoning board grant of a variance under the MLUL, the overriding public policy concerns expressed by the Appellate Division in that matter are just as applicable-if not more so-under the circumstances presented in this matter. The concerns for significant risk for abuse, favoritism or bad faith on the part of a municipality are much greater when it is the ruling body (in this case the Mayor and Council), which may engage in "freewheeling bidding" for contributions or givebacks, as opposed to local regulatory bodies like the planning or zoning boards.

As noted by the Appellate Division in Nunziato, which this Court finds very compelling and persuasive in ruling on the issue presented herein, the compelling concern was correctly described as follows:

> We conclude that the kind of freewheeling bidding under review is grossly inimical to the goals of sound land use regulation. The intolerable spectacle of the planning board haggling with the applicant over monies strongly suggest that variances are up for sale. This cannot be a countenanced proceeding in which this has occurred, and the proceeding is thereby irremediably tainted and must be set aside. Nunziato, supra at pg. 133-34. (emphasis added).

There is no statutory authorization for the Defendant's request for the givebacks or contributions and the Court adopts the following analysis from Nunziato:

> Without legislated standards, the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited. Approvals would be granted or withheld depending upon a board members arbitrary sense of how much an applicant should pay. Cases can be visualized in which neighboring landowners file competing applications for site approval of shopping center developments and where the applicant promising the largest contribution is granted approval, and the others are not. Nunziato, supra at pg. 133-43.

It is plainly obvious that the very same concerns which motivated the Appellate Division to overturn the planning board actions in Nunziato are just as compelling here.

Just as in Nunziato, one can easily envision a Mayor and Council approving redevelopment areas and/or redevelopment plans in light of which applicant is offering the greatest giveback or contribution to the municipality, or to selected non-profit organizations or schools; such as occurred here. Thus, as there is no statutory authority or standards regulating these givebacks (as discussed below) the Defendant's actions in adopting the ordinance and the amended redevelopment plan are void as a matter of public policy.

Finally, it should be noted that this Court is not considering any argument relating to proposed Legislative bills which have never been adopted. Legislative inaction is generally a poor basis for

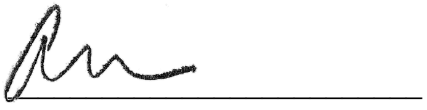
statutory interpretation. In re State 114 N.J. 316, 327 n.2 (1989). The Court also notes that there was much discussion amongst the parties relating to Britwood Urban Renewal LLC v. City of Asbury Park 376 N.J. Super 552 (App. Div. 2005). That case, however, does not address the issues presented here because the Appellate Division emphasized that the LRHL did not permit the City to impose the off-site infrastructure contributions in that matter specifically "…because Plaintiff was not a party to a contract and therefore was not a redeveloper". Ibid. at pg. 570. The Appellate Court specifically held that "…(I)n light of this disposition, we need not consider the (general) validity of (the ordinance in question)" (which related to the requirement for the off-site infrastructure contributions in connection with the City's redevelopment plan).

CONCLUSION

There is no need for discovery as to the City's motive in this case. The risk of bad faith, favoritism and the unlimited range of discretion, which would be afforded to municipalities in exacting off-tract contributions from redevelopers, is too great. Therefore, the Defendant's motion to dismiss is *denied*.

In light of the import of this ruling, the Court will schedule a Case Management Conference on *April 11, 2019 at 2:30 p.m.* The parties may appear telephonically to address whether any further discovery is warranted, or whether motion practice may be appropriate instead.

So ordered,



Hon. Anthony V. D'Elia, J.S.C.